

1 IN THE CHANCERY COURT
2 OF THE STATE OF TENNESSEE
3 TWENTIETH JUDICIAL DISTRICT
4 DAVIDSON COUNTY

5 STATE OF TENNESSEE, ex rel.)
6 Paula A. Flowers,)
7 Commissioner of Commerce and)
8 Insurance for the State of)
9 Tennessee,)

10 Petitioner,)

11 Vs.)

CASE NO.
03-1614-II

12 UNIVERSAL CARE OF TENNESSEE,)
13 INC., a Tennessee for-profit)
14 health maintenance)
15 organization, UNIVERSAL CARE)
16 HEALTH SYSTEMS, INC., a)
17 California corporation, and)
18 UNIVERSAL CARE, INC., a)
19 California corporation,)

20 Respondents.)

21 BE IT REMEMBERED that the above-captioned
22 cause came on for hearing on this, the 25th day of
23 June, 2003, in the above Court, before the
24 Honorable Carol L. McCoy, Judge presiding, when
and where the following proceedings were had, to
wit:

VOWELL & JENNINGS, INC.
Court Reporting Services
328 Washington Square Building
222 Second Avenue North
Nashville, Tennessee 37201
(615) 256-1935

1 THE COURT: Good afternoon.

2 MS. KLEINFELTER: Good afternoon,

3 Your Honor.

4 MR. HICKS: Good afternoon, Your
5 Honor.

6 THE COURT: I have had an
7 opportunity to read a verified petition for the
8 appointment of a receiver for purposes of
9 liquidation and injunction as it relates to
10 Universal Care of Tennessee, Inc., a Tennessee
11 for-profit health maintenance organization,
12 Universal Care Health Systems, Inc., a California
13 corporation, and Universal Care, Inc., a
14 California corporation.

15 It is one of 35, and I have just
16 returned from lunch and found a separate statement
17 of evidence relating to the TennCare litigation
18 that was filed this morning at 11:40, Universal
19 Care of Tennessee, Inc.'s memorandum in response
20 to request for entry of order of liquidation and
21 the affidavit of Michael W. Kinney. I haven't had
22 a chance to read the last three documents.

23 Are we ready to proceed?

24 MS. KLEINFELTER: Yes, Your

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1 APPEARANCES:

2 For the Petitioner:

3 MS. JANET M. KLEINFELTER
4 MR. STEVEN A. HART
5 State of Tennessee
6 Financial Division
7 Cordell Hull Building
8 425 5th Avenue North
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10 (615) 741-7401

11 For Universal Care of Tennessee, Inc.:

12 MR. JOHN S. HICKS
13 Baker, Donelson, Bearman & Caldwell
14 Commerce Center
15 Suite 1000, 211 Commerce Street
16 Nashville, Tennessee 37201
17 (615) 726-5600

18 Special Appearance for
19 Universal Care, Inc., and
20 Universal Care Health Systems, Inc.:

21 MR. D. ALEXANDER FARDON
22 Harwell, Howard, Hyne
23 Gabbert & Manner, P.C.
24 315 Deaderick Street
Suite 1800
Nashville, Tennessee 37238-1800

1 Honor. Good afternoon. I'm Janet Kleinfelter
2 with the Attorney General's office, and I'd like
3 to introduce a couple of people to the Court.
4 With me at counsels' table is Steve Hart who is
5 special counsel with our office.

6 And then behind me, Your Honor, is
7 Commissioner Flowers, commissioner of the
8 Department of Commerce and Insurance, and the
9 petitioner in this case. And with her also is
10 Bill Hubbard of the firm of Weed, Hubbard, Berry &
11 Doughty who I will be talking about shortly. This
12 is the commissioner's petition for the appointment
13 of a receiver for purposes of liquidation of
14 Universal.

15 Our petition sets out the grounds
16 for liquidation under 569-301-306 and basically --
17 Your Honor has read it. I don't need to -- Your
18 Honor is quite familiar with it. I don't need to
19 reiterate it. It's our position though that we
20 have a company here that is insolvent and is in a
21 hazardous financial condition.

22 I have some -- I have some little
23 visual aids that I prepared if the Court felt like
24 it was necessary to go through that discussion of

1 how -- of the department's position, the
2 commissioner's position, on the net worth
3 deficiency. And I'm prepared to present that to
4 Your Honor if you'd like me to do that or if you
5 felt the petition was sufficiently clear --
6 THE COURT: I think having read
7 the petition -- and I've looked at a number of the
8 documents that you filed that I was interested in
9 for purposes of this hearing that the record would
10 support the application as far as the
11 commissioner's concern.

12 I do want to hear though from
13 Universal Care. One, I haven't had a chance to
14 read their memo in the affidavit, and I don't know
15 their position.

16 But it does state in the document
17 that they filed, called "Separate Statement of
18 Evidence," that they had filed this to assist me
19 in understanding the overwhelming weight of
20 evidence supporting Universal's claim for a
21 hundred million dollars against the State of
22 Tennessee. So I need to hear that.

23 MS. KLEINFELTER: Your Honor,
24 their actual memorandum in response indicates that

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1 they don't -- I don't think they oppose the order
2 of liquidation in and of itself. They oppose the
3 terms, and in specific what they would like is an
4 order of liquidation that provides that the
5 existing management of Universal prosecute the
6 litigation through their present counsel. That is
7 currently pending before the Claims Commission.

8 That is the lawsuit that was filed
9 on May 30th against the commissioner of F and A
10 and the director of the TennCare Bureau in the
11 State of Tennessee for \$75 million, and that is
12 what the statement of evidence is in support of.
13 It's a discussion of that breach of contract claim
14 and the evidence they think that supports it.

15 And our problem with that request,
16 Your Honor, is that there is absolutely no
17 authority in the Uniform Insurers Rehabilitation
18 and Liquidation Act to accept out an asset of a
19 receivership estate.

20 And in particular, if you look, the
21 statute provides in 569-307 -- it says that "An
22 order to liquidate the business of a domestic
23 insurer shall appoint the commissioner and shall
24 direct the commissioner forthwith to take

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1 possession of the assets of the insurer and to
2 administer them under the general supervision of
3 the Court." And it goes on to provide that "The
4 liquidator shall be vested by operation of law
5 with a title to all of the property contracts and
6 rights of action and all of the books and records
7 of the insurer ordered liquidated wherever located
8 as of the entry of the final order of
9 liquidation."

10 This is a clear declaration by the
11 general assembly that all of the assets, whether
12 they be property, whether they be contract,
13 whether they be rights and action, which is what
14 the Claims Commission lawsuit would be, that title
15 to all of these assets are immediately vested in
16 the commissioner upon entry of a final order of
17 liquidation.

18 The statute doesn't say that all
19 assets except for claims against the State of
20 Tennessee or except for this particular class of
21 assets or this kind of asset. It says all assets
22 are vested in the commissioner. So it's our
23 position, first of all, that there simply is no
24 authority to accept out a particular asset of the

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1 receivership estate and to leave that asset under
2 the direction and control of current management.
3 The liquidator is either liquidator of the entire
4 estate and all the assets or she is liquidator of
5 nothing.

6 Secondly, the reason why Universal
7 has asked for this order is because -- and this is
8 on Page 12 of their memorandum, is because -- they
9 state, "Because the petitioner and the defendants
10 in the TennCare litigation serve at the pleasure
11 of the governor, a conflict appears to exist in
12 the petitioner's exercise of discretion in making
13 decisions regarding the prosecution of the
14 TennCare litigation.

15 The highly publicized fiscal
16 challenges facing the State and the current
17 governor's administration appear to conflict with
18 the interest of this receivership estate to
19 maximize the recovery through the TennCare
20 litigation."

21 And the problem is, Your Honor, is
22 that again the statute specifically authorizes and
23 directs that it is the commissioner as liquidator
24 who is supposed to prosecute any litigation, and

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1 that's in 569-310A, Subsection 14, which says that
2 the commissioner -- I mean, "The liquidator has
3 the power to continue to prosecute and institute
4 in the name of the insurer or in the liquidator's
5 own name any and all suits and other legal
6 proceedings in this state or elsewhere and abandon
7 the prosecution of claims the liquidator deems
8 unprofitable to pursue further."

9 This is a recognition -- first of
10 all, this is a clear grant of authority to the
11 commissioner as liquidator only. To no one else.
12 And it is a recognition and acceptance by the
13 general assembly that it is the commissioner as
14 the liquidator who is supposed to make that
15 determination to evaluate any and all claims and
16 lawsuits whether they are pending or could be
17 filed to evaluate them and make the determination
18 as to whether or not they are profitable to pursue
19 further and then to continue to pursue them or to
20 institute them in the instance that she evaluates
21 a potential claim and says, This is a profitable
22 claim, I'm going to file a lawsuit to pursue it.

23 But there is no authority to say,
24 We're going to let current management prosecute

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1 pending lawsuits. And, Your Honor, we have here
2 today -- we specifically brought here Commissioner
3 Flowers and Mr. Hubbard because Commissioner
4 Flowers has proposed in the petition to hire
5 Mr. Hubbard to represent her to independently
6 evaluate pursuant to this provision in 569-310-A14
7 to evaluate the lawsuit that has been filed in the
8 Claims Commission to help the commissioner make
9 that determination, whether or not it is
10 profitable to pursue it.

11 And in the event the determination
12 is made that it is profitable, then to represent
13 her in that proceeding. And they are here today,
14 Your Honor, to address any concerns or questions
15 that the Court might have with that proposal. It
16 is similar to a proposal that was made in the
17 litigation involving another TennCare HMO that was
18 placed in litigation, Tennessee Coordinated Care
19 Network.

20 And then finally, Your Honor, again,
21 I refer to Universal's own filings. They're not
22 asking this Court to allow them to continue to
23 prosecute this lawsuit in order to maximize
24 recovery for the providers. Their own response

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1 says that UCT's owners are highly motivated to
2 aggressively prosecute the TennCare litigation.
3 The only opportunity for them to realize even a
4 partial recovery of their investment and to
5 recover severance pay for the employees that
6 recruited to UCT is through successful prosecution
7 of the TennCare litigation.

8 UCT's owners are committed to
9 aggressively pursue the TennCare litigation and
10 desire to draw in the work already performed and
11 use UCT's present counsel to pursue the TennCare
12 litigation with a reasonable cost paid by the
13 estate subject to the approval of the Court.

14 So, Your Honor, they want to -- they
15 want to pursue this lawsuit so they can recover
16 their investment and they can recover money to pay
17 their employees' severance pay. Well, first of
18 all, there is absolutely no authority in the act
19 to pay severance pay to employees unless there's a
20 contractual obligation for it, and there's no
21 evidence that there is any sort of contractual
22 obligation that Universal pay severance pay to
23 their employees.

24 And in terms of recovering their

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1 investment -- well, if you look at the classes of
2 priorities of claims which the legislature has set
3 out in the act, set out in 569-330, there are nine
4 classes of claims. Class 9 is the claims of
5 shareholders or other owners in their capacity as
6 shareholders.

7 What that means is that everybody,
8 everybody that has a possible claim against the
9 estate of Universal, recovers first, and they have
10 to recover a hundred percent on the dollar before
11 claims that fall in Class 9 -- before shareholders
12 can receive any recovery of their investment.

13 And yet they're asking the Court to
14 allow them to prosecute a case for which there is
15 no statutory authority through their present
16 counsel and have that be paid by the estate, by
17 the receivership estate, when there is no evidence
18 that a determination has been made that this is a
19 profitable claim or that it would be economical.

20 In fact, I would submit that it
21 would not be economical because their current
22 counsel is located both here -- they have counsel
23 here in Tennessee and in California. This is a
24 company that right now, Your Honor, has

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<p>1 approximately \$9 million in assets, and they want 2 to use those assets to pursue this claim again for 3 which there is absolutely no statutory authority. 4 THE COURT: Let me ask you a 5 question, because it occurs to me in this case and 6 in another case that I have -- the statute was 7 written, I think, in 1991 -- 8 MS. KLEINFELTER: Yes. 9 THE COURT: -- before the 10 inception of TennCare. I don't think that the 11 general assembly in its wildest imagination ever 12 thought that the State itself would be involved in 13 the insurance business, would be a creditor, would 14 be a defendant. And you are exactly right as to 15 what the legislation says. 16 I am and continue to be puzzled by 17 the apparent conflict of interest that the State 18 has in being subject to litigation in which the 19 State itself is acting as the regulator over the 20 entire enterprise. Now, you can't solve that 21 question. You can't answer it. I can't answer 22 it, and I can't solve it. 23 But I am telling you that there is 24 woefully amiss a section in this code to deal with</p> <p style="text-align: center;">13</p>	<p>1 understand how it's supposed to work and who gets 2 to play a role in either the rehabilitation and 3 liquidation. That doesn't need to be explained, I 4 don't think, anymore. 5 MS. KLEINFELTER: Okay. The 6 issue is one that unfortunately has to be 7 addressed to the general assembly and cannot be 8 resolved here. Thank you. 9 THE COURT: Mr. Hicks. 10 MR. HICKS: Good afternoon, Your 11 Honor. Before we get started, with the Court's 12 permission, I'd like to introduce Michael Kinney 13 of the California bar who has appeared for 14 Universal in this -- actually his partners 15 appeared before Chancellor Kilcrease with me 16 before, and Mr. Kinney and his partner appeared in 17 front of Judge Nixon. I'd like to ask the Court's 18 permission for him to appear with me today. 19 THE COURT: Certainly. Welcome, 20 sir. 21 MR. KINNEY: Thank you, sir. 22 THE COURT: Did you have a 23 problem, Ms. Kleinfelter? 24 MS. KLEINFELTER: No. Just</p> <p style="text-align: center;">15</p>
<p>1 the situation involving TennCare, and it is a 2 political quagmire. I'm just one single little 3 chancellor sitting here, and you keep bringing me 4 all these what I consider very serious ethical 5 dilemmas, and the ethics are written into the code 6 in a different section. 7 MS. KLEINFELTER: I agree, Your 8 Honor. It is a difficult situation, and you're 9 right. It is not something that I can solve. And 10 as Your Honor has acknowledged, it's not something 11 that you can resolve. I mean, unfortunately it's 12 in the hands of the general assembly. And Your 13 Honor is also correct that the uniform act was 14 passed before TennCare and does not -- 15 Because it is a uniform act and 16 TennCare is not uniform, it's done pursuant to a 17 waiver. It does not take into account the unique 18 circumstances of TennCare. 19 THE COURT: I agree. 20 MS. KLEINFELTER: But this is -- 21 THE COURT: I understand the 22 mechanisms by which the legislature set up 23 rehabilitation and liquidation for insolvent 24 insurance companies. I do understand that. I</p> <p style="text-align: center;">14</p>	<p>1 rearranging. 2 MR. HICKS: May it please the 3 Court, I would like to address some background of 4 Universal Care of Tennessee. But before I do 5 that, I'd like to address out of the box some of 6 the comments that General Kleinfelter -- and 7 concerns that General Kleinfelter raised with the 8 relief that is sought by Universal today. 9 First of all, Your Honor, General 10 Kleinfelter is correct that 569-101 et seq. 11 provides for the rehabilitation and liquidation of 12 insurance companies, and those procedures are made 13 applicable to HMOs that operate in Tennessee. 14 Section 56-9-101 provides that this chapter shall 15 be liberally construed to affect the purpose 16 stated in Subsection D. 17 One of the -- one of the 18 constituents that's listed in Subsection D and one 19 of the goals of the statute as stated in D is that 20 the purpose of this chapter is the protection of 21 the interest of insureds, claimants, creditors and 22 the public generally with minimum interference 23 with the normal prerogatives of the owners and 24 managers of insurers.</p> <p style="text-align: center;">16</p>

1 If it please the Court, there are no
2 policyholders or insureds who are affected by this
3 liquidation. Effective June 1st of this year the
4 Bureau of TennCare transferred all the enrollees
5 from Universal Care of Tennessee to TennCare
6 Select. Thus the interest of those TennCare
7 enrollees aren't going to be affected by the
8 rulings of Your Honor and the process of this
9 liquidation proceeding.

10 So where does that leave us with a
11 constituency that's addressed by the statute?
12 That leaves us principally with the creditors, and
13 some of them are represented here today, Your
14 Honor. There are a large number of providers who
15 have claims against Universal Care of Tennessee
16 whose interest lie in the satisfaction of those
17 claims, and the only mechanism, the only
18 significant asset that this HMO has is its claim
19 against the TennCare Bureau.

20 The claim has been referred to in
21 the papers as the TennCare litigation, and that's
22 how I'll continue to refer to it with the Court's
23 permission. The TennCare litigation arose back
24 in -- essentially in 2001, Your Honor, when the

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1 owners of Universal Care were solicited by the
2 previous administration to put together MCO to
3 come in and address -- serve the middle Tennessee
4 population.

5 In 2000 and 2001 the Davis family,
6 who were the owners of Universal Care of Tennessee
7 and who likewise operate a successful Medicaid
8 managed care HMO in California called Universal
9 Care, Inc., came to Tennessee and put together the
10 requisite provider network and the other systems
11 and the infrastructure necessary to serve a
12 hundred thousand TennCare enrollees starting on
13 July 1, 2001.

14 During the 2001 open enrollment
15 period, it became apparent to the owners and
16 operators of Universal Care of Tennessee that they
17 were experiencing significant adverse selection,
18 meaning that their population was sicker than the
19 average TennCare population. They brought this to
20 the attention of the TennCare Bureau.

21 They were assured that the payments
22 that they would receive in the form of the
23 capitation payments contemplated as Your Honor
24 knows by the contractor risk agreement would be

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1 adjusted to appropriately address the risk factor
2 and adverse selection of their population. During
3 this same time frame, Your Honor, they were asked
4 by the bureau to increase the number of enrollees
5 that they accepted on this new plan from a hundred
6 to 134,000.

7 With the addition of the additional
8 34,000 enrollees came an attendant increase in
9 cost, administrative burden and the like. Your
10 Honor, if I could digress for a moment, a great
11 deal of this information is supported in that
12 lengthy statement of evidence. The statement of
13 evidence reflects quotations principally from
14 declarations and deposition testimony taken in the
15 case filed in front of Judge Nixon earlier this
16 year.

17 And Mr. Kinney's affidavit strictly
18 speaks to the source of those quotations and that
19 they were lifted from the depositions taken in
20 that case.

21 THE COURT: What's the status of
22 that?

23 MR. HICKS: Judge Nixon denied
24 our request for a preliminary injunction. The

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1 State's motion to dismiss is pending.

2 THE COURT: Thank you.

3 MR. HICKS: But as I was saying,
4 the evidence that was taken and the deposition
5 testimony that was taken in the Federal Court case
6 showed that without Universal's knowledge
7 unbeknownst to Universal -- but with the knowledge
8 of the TennCare Bureau, Universal had a
9 disproportionately high-risk score.

10 The internal information generated
11 by TennCare showed that at the time Universal went
12 live in the TennCare program in July of 2001 their
13 risk score for their population was between 116
14 and 118 percent of the average for the TennCare
15 population. There's no dispute that they didn't
16 tell Universal Care of Tennessee about this.

17 Not surprisingly, Your Honor,
18 Universal almost immediately sustained enormous
19 losses in provider claims as a result of this and
20 other breaches that we allege in the TennCare
21 litigation of the contractor risk agreement. By
22 March or April time frame of 2002 Universal's
23 debts to the providers for services rendered to
24 the enrollees that are covered by the Universal

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<p>1 plan approached the neighborhood of \$60 million.</p> <p>2 In April of 2002, effective April</p> <p>3 12th of 2002, the State of Tennessee put Universal</p> <p>4 Care -- and about the same time frame the rest of</p> <p>5 the TennCare MCQs -- on a non-risk contract. That</p> <p>6 is, Universal administered the benefit for its</p> <p>7 TennCare enrollees. The State paid the medical</p> <p>8 cost and administrative fee to Universal Care.</p> <p>9 At about the same time, Your Honor,</p> <p>10 the March and April, May 2002 time frame the</p> <p>11 Bureau of TennCare, the governor's office, the</p> <p>12 commissioner of Finance and Administration and</p> <p>13 Universal negotiated the terms of a settlement</p> <p>14 agreement.</p> <p>15 Pursuant to the terms of the</p> <p>16 settlement agreement that was negotiated but not</p> <p>17 executed by the State, the State of Tennessee</p> <p>18 agreed to pay 90 percent of the outstanding</p> <p>19 provider claims up to the amount of \$61 million.</p> <p>20 MS. KLEINFELTER: Your Honor, I'd</p> <p>21 like to know what this has to do -- this whole</p> <p>22 discussion -- I mean, there's no question that</p> <p>23 there is a breach of contract cause of action</p> <p>24 pending in the Claims Commission. This claim is</p> <p style="text-align: center;">21</p>	<p>1 THE COURT: And then I'm going to</p> <p>2 give Ms. Kleinfelter probably about another 10 or</p> <p>3 15 minutes, but this is your opportunity. So</p> <p>4 anything that you want to tell me now is the time</p> <p>5 because you probably won't get an opportunity to</p> <p>6 stand back up. But I don't want to cut you off.</p> <p>7 I thought you were giving me background</p> <p>8 information. I appreciate it, and I take it in a</p> <p>9 that regard.</p> <p>10 MR. HICKS: I am giving the Court</p> <p>11 some background information, but I'm also leading</p> <p>12 to an issue that Your Honor was concerned with in</p> <p>13 her comments earlier about the conflict that</p> <p>14 exists with the commissioner in the administration</p> <p>15 of this case.</p> <p>16 THE COURT: I think that I made</p> <p>17 that comment for other ears than those that just</p> <p>18 sit in this courtroom, and it is a series, serious</p> <p>19 problem that the Courts can't deal with, and they</p> <p>20 put the Courts in a very awkward position because</p> <p>21 we should not be condoning ethical conflicts. And</p> <p>22 that's what the State is asking us to do.</p> <p>23 MR. HICKS: I understand, Your</p> <p>24 Honor. And let me say this. What Universal --</p> <p style="text-align: center;">23</p>
<p>1 in dispute. I'd like to know what that has to do</p> <p>2 with the authority that this Court has to allow --</p> <p>3 to enter an order of liquidation allowing the</p> <p>4 current management to continue to prosecute that</p> <p>5 case.</p> <p>6 I don't see where this is relevant</p> <p>7 to this whole discussion of their -- the basis of</p> <p>8 their contract cause of action, their breach of</p> <p>9 contract cause of action, relates to that issue</p> <p>10 which is pending before Your Honor.</p> <p>11 THE COURT: Mr. Hicks.</p> <p>12 MR. HICKS: Give me a couple of</p> <p>13 minutes. I'll wrap that up, Your Honor,</p> <p>14 because --</p> <p>15 THE COURT: Let me just say one</p> <p>16 or two things. Ms. Kleinfelter is right that it</p> <p>17 probably isn't relevant. This also is a hearing.</p> <p>18 So I usually let people have a say so. But I</p> <p>19 think that it is wise for me to have a little</p> <p>20 control over this.</p> <p>21 So I'll give you about 15 or 20 more</p> <p>22 minutes to either wrap up this segue and go into</p> <p>23 the meat of your argument.</p> <p>24 MR. HICKS: I will, Your Honor.</p> <p style="text-align: center;">22</p>	<p>1 what the owners of Universal are asking the Court</p> <p>2 to do is not as the attorney general indicates,</p> <p>3 divest the receiver of the ownership of this</p> <p>4 litigation.</p> <p>5 What we're asking this Court to do</p> <p>6 is to appoint a disinterested person, a person</p> <p>7 who's perhaps akin to what Chancellor Lyle did in</p> <p>8 the Tennessee Coordinated Care Network when she</p> <p>9 appointed Howard Vogel as a special deputy</p> <p>10 liquidator to evaluate the litigation. But we are</p> <p>11 asking the Court to go a step further.</p> <p>12 We're asking the Court to allow us</p> <p>13 to continue to prosecute the litigation subject to</p> <p>14 the supervision and the authority by the Court</p> <p>15 based on the recommendations made by this</p> <p>16 disinterested person, and I would submit to the</p> <p>17 Court that it would be appropriate for this</p> <p>18 disinterested person to report not only to the</p> <p>19 Court but also to the commissioner regarding the</p> <p>20 progress of the case and the propriety of pursuing</p> <p>21 it further.</p> <p>22 THE COURT: Mr. Hicks, as I</p> <p>23 understand Ms. Kleinfelter's remarks, the matters</p> <p>24 that you have filed do not oppose the liquidation</p> <p style="text-align: center;">24</p>

1 but go more to a point that you just made. And
2 that is your request to appoint a disinterested
3 person to serve as special master or deputy
4 liquidator. Now --
5 MR. HICKS: It's quite difficult
6 for me to stand here, Your Honor, and do that.
7 But it's likewise difficult for me to say that at
8 least as to the definition of insolvency in the --
9 in the statute where it provides as one
10 alternative prong that debts are not being paid as
11 they're incurred.

12 Clearly there's 50-plus million
13 dollars in pre-April 12, 2002 provider claims that
14 haven't been paid.

15 THE COURT: Part of what you're
16 asking me to do -- and I have pondered this
17 previously, is that the statute is structured to
18 give the commissioner unfettered discretion as to
19 how to rehabilitate or to liquidate, and then
20 there are some steps that kick in. The Court has
21 the overall responsibility for approving what's
22 done.

23 In the past, I have found it unusual
24 that I only have one side to what is known as

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1 litigation. There are people whose rights are
2 going to be affected by any action that the
3 commissioner takes. I'm not in a position nor do
4 I choose to advocate anyone's position. In the
5 past I've asked questions from the bench, and
6 counsel for the commissioner, I think, initially
7 thought that I was adverse to whatever they were
8 recommending.

9 One is I ask questions for
10 educational purposes. Two, I ask questions
11 because I'm incredulous. And to the extent that
12 anybody ever reads this transcript, they will know
13 that I don't go around sanctioning things that I
14 think are wrong without commenting on them. I'm
15 required by the statute to do it, follow what is
16 my sworn duty.

17 That doesn't make me feel
18 comfortable, and I haven't quite answered that
19 dilemma for myself yet because I took an oath to
20 follow the law. And this isn't the only law on
21 the books. Those laws that are passed by the
22 Supreme Court are also on the books.

23 Now, when I've had this dilemma, I
24 did appoint a special master. That somewhat

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1 diffused me as the judge from being the target for
2 hostile feelings for asking questions. It
3 diffused it over to the special master. That's
4 not the point of having a special master.

5 The reason that I had a special
6 master again was for educational purposes to
7 assist me in a lot of the areas with regards to
8 insurance companies that I don't have a
9 familiarity with or an ease of understanding, and
10 I need to be able to ask questions where matters
11 are explained to me.

12 In this instance, what you're saying
13 is the justification for a special master or
14 deputy liquidator is that the person should be
15 charged with responsibility to review and monitor
16 the progress of the TennCare litigation and make
17 recommendations to the Court regarding its
18 prosecution.

19 That treads on the unfettered
20 ability of the commissioner to take whatever
21 actions she sees fit with the liquidation, and the
22 liquidation would entail handling, quote, the
23 liquidation. That doesn't mean that I say people
24 can't know because I think the department has

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1 already realized that even though they are solely
2 in charge they have to do everything out in the
3 open, and that is of great concern to me.

4 I've already chided one state
5 attorney who was rather presumptuous enough to
6 tell the attorney that he didn't have to share
7 information. Anybody that gets appointed to
8 represent the commissioner represents the general
9 public. All this is going to be handled in the
10 open. And so if Mr. Hubbard or anybody else is
11 appointed, they're going to be directed to share
12 that information.

13 They won't get to make agreements
14 just over the telephone and then bring it in and
15 ask me to approve it. Likewise, I don't get to
16 have comments from the public as to how the
17 prosecution should be handled. I don't tell
18 anybody how the prosecution should be handled.

19 And if somebody wants to make a
20 recommendation, I'm not the one to whom the
21 recommendation should be made unless, of course,
22 you just want it to go in File 13, because that's
23 where it will go. There's a lot that chancellors
24 can do, but there's a great deal more they can't

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1 do, and I don't lose sight of that fact. But I'm
2 eating into your time. So now you have your 20
3 minutes.
4 MR. HICKS: I understand, Your
5 Honor, and I understand the Court's concerns and
6 the constraints that concern the Court. However,
7 again, the rehabilitation statute is designed --
8 and it's goal as stated in the preamble is to
9 encourage the Court's liberal construction to meet
10 the ends and the purposes that are set forth in
11 101-D.

12 And, again, the purpose is to
13 protect the interest in this case principally of
14 creditors because they're the primary constituency
15 in this liquidation. I started the rendition or
16 the description of the TennCare litigation for
17 Your Honor to make the following point which I was
18 about to make. And that is that at the time the
19 settlement agreement that I referenced was reached
20 and for essentially --

21 THE COURT: When you said it was
22 reached but not signed, then --

23 MR. HICKS: The terms were
24 negotiated. The State of Tennessee sought -- the

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1 position was that it sought federal financial
2 participation by the centers for Medicaid and
3 Medicare services for two-thirds of the money.

4 During the year that followed the
5 negotiation of that agreement, the terms of that
6 agreement, the Department of Commerce and
7 Insurance examined the statutory financial
8 statements that were filed by Universal Care of
9 Tennessee and admitted that asset.

10 In other words, the commissioner or
11 her predecessor in reviewing the solvency of
12 Universal Care for a year saw that line item that
13 said, We're owed these mega millions of dollars.
14 And the Department of Commerce and Insurance
15 didn't say, No, that's not a good receivable.
16 You're hopelessly insolvent. We're putting you in
17 receivership.

18 They didn't do that. And former
19 commissioner -- well, deputy commissioner of the
20 TennCare Bureau, Martins, testified in his
21 deposition in the Federal Court litigation that it
22 was his decision when he was with Commerce and
23 Insurance to admit that asset. He also testified
24 that it was his decision when he went to TennCare

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1 to decide not to pay the State's share of the
2 money.

3 But the conflict that arises is the
4 commissioner of Commerce and Insurance or her
5 predecessor in interest made the decision for a
6 year to admit the asset and now makes the decision
7 not to admit the asset, declare Universal
8 insolvent, and put them into receivership.

9 As I've said before, Universal
10 doesn't stand here today and say, Your Honor, you
11 shouldn't -- because of that, you shouldn't put us
12 in receivership. You shouldn't put us in
13 liquidation.

14 THE COURT: Let me go back to my
15 question. When I was listening to you, you said
16 that the plaintiff and the defendant negotiated a
17 settlement agreement but was not executed by the
18 State. So you all got up to the signing time. I
19 guess you were negotiating over a period of time.
20 And the State didn't sign?

21 MR. HICKS: Your Honor, the terms
22 of the agreement were agreed upon. They were
23 negotiated.

24 THE COURT: Well, my husband has

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1 been in banking for so long that I sort of know
2 how deals go right up -- right up to the bottom
3 and they walk away. It happens every day.

4 MR. HICKS: And to be honest with
5 you, the people on our side of the table thought
6 the thing had been signed if truth be known. But
7 regardless of that, the parties operated TennCare
8 and the Universal Care of Tennessee.

9 THE COURT: So you're going on --

10 MR. HICKS: And 44 times the
11 Bureau of TennCare wrote letters to Universal Care
12 of Tennessee extending the contractor risk
13 agreement based on the, quote, agreed upon
14 resolution, or that may not be an accurate quote.

15 MS. KLEINFELTER: Your Honor, if
16 we're going to talk about documents that say
17 things, let's have the documents in front of Your
18 Honor instead of Mr. Hicks' characterization of
19 what those documents say. I mean --

20 MR. HICKS: Your Honor --

21 MS. KLEINFELTER: -- the letters
22 in question and the settlement agreement and
23 everything that he's referencing can speak for
24 themselves instead of Mr. Hicks trying to

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1 characterize what they say and then of course me
 2 coming along afterwards and recharacterizing what
 3 they say.
 4 MR. HICKS: Your Honor, I'm sorry
 5 if General Kleinfelter doesn't agree with my
 6 characterizations and --
 7 THE COURT: I will say that most
 8 of what I am hearing is passing through my ears,
 9 is information that hopefully might stay there
 10 someday.
 11 But it doesn't carry any weight of
 12 evidentiary proof, and it really doesn't mean much
 13 because Mr. Martins has testified in my courtroom
 14 under oath. And I do listen to him when he's
 15 under oath, but he also is reported to have said a
 16 number of other things. Until he sits here under
 17 oath, it doesn't mean much to me.
 18 This isn't an evidentiary hearing,
 19 and your concern really has to do primarily with
 20 the TennCare litigation. So I'm just letting you
 21 tell me a little bit. And, Ms. Kleinfelter, I
 22 don't think it's necessary that I look at a lot of
 23 documents.
 24 It's not even necessary that you

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1 respond to them. At some point it might become
 2 important. I don't think so. We'll find out. I
 3 think that's another area that maybe the Claims
 4 Commission gets to look at all those --
 5 MR. HICKS: It is, Your Honor.
 6 And that's the merits of that claim. The purpose
 7 for my comments was simply to point out support
 8 for Your Honor's observation of the conflict that
 9 exists.
 10 And in Your Honor's exercise of the
 11 powers that are granted to the Court by the
 12 statute such as they are, the statute also
 13 contemplates that the broad purpose of liberal
 14 construction of a statute is to protect the
 15 interest of creditors.
 16 Now, General Kleinfelter has told
 17 Your Honor that what Universal's owners are
 18 seeking is to recover their money first. If
 19 that's what the implication of our papers is, Your
 20 Honor, then I didn't do a good job of setting it
 21 out.
 22 Because what Universal's owners
 23 propose is that they be allowed to prosecute this
 24 lawsuit so that the creditors get paid so that

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1 they have some prospect of recovering some portion
 2 of the \$7 million that they invested in starting
 3 this company up at the request of the State of
 4 Tennessee. Universal's owners aren't seeking to
 5 get paid before anybody else.
 6 We recognize the -- we recognize the
 7 statutory scheme for priority of distribution
 8 under the liquidation statute. We recognize that
 9 this is an asset owned by this estate. We're not
 10 trying to have Your Honor carve it out and say,
 11 Here, Universal owners. You take it. You own it.
 12 You recover.
 13 What we're trying to do is not to
 14 let the commissioner of the Department of Commerce
 15 and Insurance abuse her discretion and choose not
 16 to prosecute this lawsuit, and the reason for the
 17 extensive description of the lawsuit and the
 18 papers that were filed is so that Your Honor can
 19 judge whether or not at least preliminarily it
 20 would be an abuse of discretion for the
 21 commissioner to use what General Kleinfelter has
 22 described as unfettered discretion.
 23 But what the Court of Appeals has
 24 said is a standard of abuse of discretion not to

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1 prosecute that lawsuit. And I've been authorized
 2 to state, Your Honor, that Universal's owners will
 3 bear the cost to prosecute in the litigation
 4 subject to the right to recover the cost of
 5 prosecuting this litigation from any recovery so
 6 that the remaining assets aren't hampered or
 7 diminished as a result of prosecuting this claim.
 8 They feel that strongly about it.
 9 The Court again is charged with a
 10 liberal construction of the statute, and a liberal
 11 construction of the statute to protect the
 12 constituents that are listed in Section D of
 13 Section 101 would dictate that it's appropriate to
 14 allow this procedure and to allow Universal's
 15 owners to prosecute this case for the benefit of
 16 this estate. Absent any questions from the Court,
 17 that's all I have, Your Honor.
 18 THE COURT: I have an
 19 observation, and that is that the money that your
 20 clients would like to spend on the litigation
 21 would better be spent with the legislature.
 22 That's my observation.
 23 MR. HICKS: You may be right,
 24 Your Honor.

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1 THE COURT: And I'm just
2 wondering at what point somebody is going to get
3 smart and realize what a terrible statute this is
4 as it relates to the State of Tennessee, because
5 if the State of Tennessee acts as you have
6 characterized it through its agents, no one will
7 do business with the State of Tennessee.

8 MR. HICKS: I think that's the
9 feeling of these owners, Your Honor. Hindsight is
10 20/20 though.

11 THE COURT: And that's what
12 history is made of.

13 MR. HUBBARD: Your Honor, if I
14 may identify myself for the record. William
15 Hubbard. And I have been hired by the
16 commissioner, and she may wear two hats as
17 commissioner and as liquidator of this estate.

18 I have been hired as counsel for the
19 estate to evaluate the litigation and to pursue it
20 if it is in the interest of the estate. I only
21 wear one hat, and my advice -- I have no conflict
22 in the advice I will be giving.

23 If I determine it is in the interest
24 to pursue the litigation, then the method in which

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1 it is to be pursued will be determined at that
2 time. I think it's premature to be addressing the
3 litigation at this time before I have had an
4 opportunity to evaluate whether or not it is in
5 the interest of the estate to pursue it.

6 THE COURT: I appreciate that,
7 and I do believe that your statements are made in
8 good faith, that you will determine after you've
9 evaluated if it should be pursued. The concern
10 that I have is that the individual to whom you
11 report, which is the commissioner, still wears
12 those two hats --

13 MR. HUBBARD: I understand that.

14 THE COURT: -- and you as counsel
15 for the estate are not in charge. You are not the
16 client.

17 MR. HUBBARD: That is true as
18 well.

19 THE COURT: And the client is the
20 one that makes that determination, not the
21 attorney.

22 MR. HUBBARD: But the client in
23 this instance wears two separate hats, and the
24 client is a state official with an oath of office

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1 and --

2 THE COURT: As was Mr. Manning.
3 [Sic] Mr. Martins. Excuse me. And if the
4 representation is correct that in one capacity he
5 made one statement upon which the insurance
6 company relied for apparently some period of time
7 and if the representation is correct that at
8 another time he made a different statement to
9 their detriment, then we have a bad precedent
10 being set.

11 I don't mean to shut counsel down.
12 It looks as though people are trying to stand up
13 while I'm talking. Not a good idea. It distracts
14 me. I'll give everybody an opportunity to say
15 whatever they want to say, but Mr. Hubbard has the
16 floor.

17 MR. HUBBARD: Well, Your Honor, I
18 would like to point out that this commissioner is
19 a lawyer and well familiar with her respective
20 roles and understands her role as a --

21 THE COURT: Let me ask you a
22 question, Mr. Hubbard. If in your -- I have no
23 idea that this is a valid claim, an invalid claim,
24 smoke screen. I have no idea. If you get in and

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1 you investigate that the only reason Universal
2 Care entered into the negotiations was because of
3 representations made by the State and those
4 representations were not accurate but unknown to
5 Universal Care and they entered into it and then
6 in a matter to resolve those representations they
7 negotiated and over a period of time extensions
8 were made and operations continued with the
9 supposition that an agreement had been reached and
10 you determine that it is a credible claim and it
11 is going to be a claim because they've asked for
12 it -- I have no idea that this is true or not -- a
13 hundred million dollars, where is the State going
14 to get that money?

15 MR. HUBBARD: Well, the decision
16 would be --

17 THE COURT: Of course, now the
18 Claims Commission is limited, I think, isn't it,
19 to how much they can give?

20 MR. HUBBARD: Not on a contract
21 action. If this is a contract action and if in
22 fact it is decided and in my mind the decision is
23 what is the likelihood of prevailing and what are
24 the costs involved with pursuing it and balancing

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1 those two, is it in the interest of the estate to
2 pursue the claim? And I have -- I have no doubt
3 in my mind that if the liquidator -- if I make a
4 recommendation and the liquidator believes that
5 the basis of the recommendation is sound, then
6 that recommendation will be followed.
7 And if that recommendation is to
8 pursue this claim, the claim will be pursued. And
9 you are correct, Your Honor. There are lots of
10 interested parties out there. There are lots of
11 providers that have an interest in this estate,
12 and there are lots of people that are overlooking
13 the commissioner's shoulders so that she is not
14 making a decision with no one scrutinizing that
15 decision. So I think there are some checks and
16 balances here.
17 THE COURT: Let me ask. If you
18 are appointed and I act on the State's request, it
19 seems to me that your inquiry will necessitate you
20 interviewing and looking through what the --
21 MR. HUBBARD: I think it will
22 necessitate me most likely meeting with Mr. Hicks,
23 trying to understand the plaintiff's side of the
24 case and trying to understand the merits of the

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1 case.
2 I mean, I'm not -- I think it will
3 necessitate trying to understand the case as best
4 I can and to attempt to evaluate the likelihood of
5 success of the claim and what in dollar terms the
6 claim is worth. But to me that job -- that job is
7 a very typical job that a lawyer does day in and
8 day out. Thank you.
9 THE COURT: Ms. Kleinfelter, you're
10 next up.
11 MS. KLEINFELTER: I just want to
12 reiterate what Mr. Hubbard has just had to say
13 with respect to the commissioner exercising her
14 discretion and acting upon Mr. Hubbard's
15 recommendation. I think he made a very valid
16 point. He only wears one hat here, and that hat
17 is to evaluate this claim for the interest and the
18 benefit of the estate.
19 And the commissioner as a public
20 official -- the Court of Appeals has recognized
21 she is entitled to a presumption that she's going
22 to act properly in fulfilling her statutory
23 duties, and there are going to be a lot of people
24 looking over her shoulder. She's going to have to

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1 answer to the provider community regardless of
2 what decision she makes, whether she decides to
3 pursue the claim, not pursue the claim, pursue the
4 claim and settle it.
5 Whatever action she takes she is
6 going to have to answer to the provider community
7 and to other interested creditors. In addition,
8 if as counsel for Universal has indicated there is
9 some allegation that she has abused her discretion
10 in making her decision, this Court does have that
11 authority to review the issue of whether or not
12 she abused her discretion.
13 And the conflict that -- I don't
14 really want to get into discussion of the merits
15 of the breach of contract cause of action because
16 that's not before Your Honor.
17 However, I have to go into a little
18 bit of it because the conflict that I just heard
19 counsel articulate is that Commissioner Flowers'
20 predecessor, Commissioner Pope, for a period of
21 approximately a year allowed this claim which is
22 now the TennCare litigation -- allowed it to be,
23 quote, an admitted asset for a period of a year
24 and then all of a sudden now has decided it's not

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1 going to be an admitted asset and that they're
2 insolvent.
3 And that's not -- as Paul Harvey
4 would say, "And the rest of the story is." In May
5 of 2002, yes, the parties, Universal and the
6 State, negotiated the terms of a settlement
7 agreement.
8 That settlement agreement was made
9 subject to the full approval of the federal
10 centers for Medicaid and Medicare services, and it
11 specifically provided that if we did not get the
12 full approval that the contract with Universal was
13 terminated.
14 This settlement resulted or came
15 about as a result of TennCare terminating the
16 contract with Universal in March of 2002. It was
17 specifically conditioned upon CMS's approval. It
18 was never signed by any state official, period.
19 And during that period while we were waiting to
20 see what CMS did, the department sort of took a
21 status quo position.
22 They didn't actually say this is an
23 admitted asset and therefore you're a solvent
24 company and you meet your statutory net worth

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1 requirement. What they did was is they said
2 because we have been notified by the TennCare
3 division that this asset, this claim, is in
4 negotiations, we are not going to take regulatory
5 action.

6 There's a big distinction there
7 between saying it's an admitted asset you meet
8 your net worth requirements and saying, We're not
9 going to act upon it. We're not going to take
10 regulatory action. Then what happens is, one, we
11 get a new administration and, two, CMS finally
12 comes along and says, No, we are not going to
13 approve this. We are not going to give our full
14 approval.

15 TennCare also terminates the
16 contract on April 2nd of 2003. And at that point
17 when CMS says we're not going to approve the
18 settlement agreement, TennCare tells the
19 Department of Commerce and Insurance, This claim
20 is in dispute. You cannot consider this as an
21 admitted asset.

22 And at that point with the
23 termination of the contract and with -- which was
24 their only source of revenue, their only source of

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1 income, and with CMS saying, We're not going to
2 approve the settlement agreement and TennCare then
3 saying, Okay, if you're not going to approve it,
4 then the settlement agreement is off, and this
5 clearly is a claim that is in dispute.

6 Then the department said, Okay, now
7 circumstances have changed. We now truly have a
8 disputed asset. There is no hope of it being an
9 admitted asset, and this company -- the contract
10 has been terminated. There is no possibility of
11 eliminating this deficiency. We've now got to
12 take regulatory action. And that is exactly what
13 happened.

14 So there really is no conflict here
15 when you look at what actually happened and the
16 rest of the story. I sympathize with Your Honor's
17 dilemma. But I think as Mr. Hubbard has pointed
18 out -- the statute unfortunately says what the
19 statute says and gives the commissioner the
20 authority.

21 This is a commissioner that is --
22 she is a licensed attorney, is well versed in this
23 statute and what her legal responsibilities are
24 and what her ethical responsibilities are and is

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1 entitled to the presumption that she is going to
2 act properly in fulfilling her duties. And if
3 nothing else, she's going to have -- as
4 Mr. Hubbard said, she's going to have a lot of
5 people looking over her shoulders to make sure
6 that whatever she does is in the best interest of
7 the estate.

8 THE COURT: Thank you.

9 Mr. Hicks, I said I wasn't going to let you have
10 any further word, but you were trying to stand up.
11 and I will let you have about five minutes if you
12 want.

13 MR. HICKS: Your Honor, I wanted
14 to correct one thing, an impression that I think
15 Your Honor has. And that is that Mr. Martins
16 testified one way and said something else. What
17 I -- the point that I was trying to make in my
18 comments to the Court was that Mr. Martins made
19 the decision while he was --

20 THE COURT: What I wrote down
21 is --

22 MR. HICKS: -- with Commerce and
23 Insurance to admit that asset, and his testimony
24 was that he -- that it was his decision to admit

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1 the asset. And then the next point was that when
2 he went to TennCare it was his decision to place
3 the asset in dispute.

4 THE COURT: Thank you.

5 MR. HICKS: But at the risk of
6 not taking the five minutes that Your Honor gave
7 me, I would just like to reiterate that the
8 comments from Mr. Hubbard don't change the fact --
9 and I have no doubt in my mind that Mr. Hubbard
10 will fulfill his obligations in the highest
11 manner, the most ethical way, but his client --

12 THE COURT: Mr. Hubbard doesn't
13 have the conflict.

14 MR. HICKS: My point exactly,
15 Your Honor. That was his loyalty is to --

16 THE COURT: So the board of
17 professional responsibility stands with its doors
18 open.

19 MR. HICKS: His loyalty is to his
20 client only. And it's his client, Your Honor,
21 that has the conflict here, and that is the reason
22 that we've proposed the mechanism that we've
23 proposed. And I think it is consistent with this
24 Court's interpretation of the broad purposes of

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1 the rehabilitation statute to put that remedy in
2 place.

3 Your Honor, I think Mr. Fardon who
4 is here on behalf of Universal Care, Inc. has
5 something that he'd like to add.

6 MR. FARDON: May I have five
7 minutes, Your Honor? I'm here to speak on behalf
8 of two respondents you haven't heard from yet.

9 THE COURT: I'm here.

10 MR. FARDON: Your Honor,
11 Mr. Hicks represents Universal Care of Tennessee,
12 Inc., which is the MCO that the State seeks to put
13 in liquidation.

14 I'm Alex Fardon, Your Honor, and I'm
15 here representing the other two respondents that
16 Your Honor noted have been named in this
17 liquidation proceeding, and I'm here to ask Your
18 Honor to do something that you certainly can do
19 and in fact should do given the explicit
20 provisions of the liquidation act that we're all
21 here operating under.

22 Universal Care, Inc. is not an
23 insurer in Tennessee. It's not an MCO with the
24 TennCare program. It's a California corporation

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1 that for a period provided administrative services
2 to Universal Care of Tennessee Inc. Universal
3 Care Health Services, Inc. is not a Tennessee
4 insurer MCO with the TennCare program. It's not
5 even a California corporation as the petitioner
6 alleges.

7 It is in fact a Delaware corporation
8 that for a short period of time when Universal
9 Care of Tennessee first went live with the State
10 of Tennessee provided administrative services to
11 that entity but has not had any operations itself
12 in some time now.

13 Those two entities, Universal Care,
14 Inc. and Universal Care Health Systems, Inc. are
15 here making a special appearance, Your Honor. And
16 the reason they're here appearing specially is
17 that neither has been served with process in the
18 case and neither waives service of process. But
19 they asked me to appear here to alert Your Honor
20 to the fact that there is no legal basis or good
21 practical reason for them to be named in this
22 liquidation proceeding.

23 If Your Honor looks at the Insurer
24 Rehabilitation and Liquidation Act, Section

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1 569-102, the act specifically says that the
2 proceedings authorized by this chapter may be
3 applied, too, and there is a list of eight
4 categories of entities.

5 And Universal Care, Inc. and
6 Universal Care Health Systems as I described them
7 to you and in fact as they're described in the
8 petition don't fall with any of those categories.
9 This is a petition to liquidate an HMO, an insurer
10 operating in the State of Tennessee, but that HMO
11 is Universal Care of Tennessee, Inc., not
12 Universal Care, Inc. or Universal Care Health
13 Systems, Inc.

14 So the act itself has not authorized
15 them -- does not authorize the State to name them
16 in these proceedings. But beyond having no good
17 legal basis for naming those two entities, I
18 submit to Your Honor that the State has no good
19 practical basis for adding them.

20 I looked at the petition to try to
21 determine why the State felt compelled to name
22 these two entities in its liquidation proceeding.
23 And if Your Honor looks at Paragraph 6 and 7, the
24 State tries to explain why it took that action

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1 here. And it basically says that because these
2 two entities at some point in the past provided
3 administrative services to the MCO at issue here
4 that any liquidation of Universal Care of
5 Tennessee cannot be carried out without the full
6 corporation of Universal Care, Inc. on the one
7 hand and Universal Care Health Services on the
8 other hand.

9 As such, those two entities are
10 named and served as parties responding here so as
11 to assist in obtaining their full cooperation.
12 Well, Your Honor, if you look again at the act --
13 and this time at 569-106, the act specifically
14 requires that any officer, manager, director,
15 trustee, owner, employee or agent of any insurer,
16 any other persons with authority over or in charge
17 of any segment of the insurer's affairs shall
18 cooperate with the commissioner in any proceeding
19 under this chapter or any investigation
20 preliminary to the proceeding.

21 So, Your Honor, the act already
22 takes care of this. It happens automatically.
23 The act requires these two entities to the extent
24 they were involved in Universal Care of

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1 Tennessee -- providing administrative services to
2 that entity. To the extent that they have any
3 records or information that pertain to the
4 business of that TennCare MCO, they are required
5 under the act to cooperate with the commissioner.
6 And, in fact, I think they have
7 already been doing so. So there is no basis for
8 having to name them in the liquidation proceeding
9 in order to obtain their cooperation when the act
10 already requires it.
11 The reason this is a real concern to
12 these two entities, Your Honor, is this.
13 Universal Care, Inc., as Your Honor has heard, has
14 operated since 1985 a successful licensed health
15 plan in the state of California. The plan
16 currently has over 300,000 members, and Universal
17 Care, Inc. itself has over 13,000 employees.
18 It is harmful and it is
19 inappropriate for them to be named as a respondent
20 in this liquidation proceeding when they are not
21 the entity being liquidated of any proceedings,
22 when the act does not provide for them to be named
23 in the proceedings.
24 So, Your Honor, there is no legal

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1 basis for naming them. There's no good practical
2 reason for naming them, and in fact they have not
3 been served for process. And so if Your Honor
4 enters an order of liquidation, I'd ask that you
5 make note in the order that the order does not
6 apply to them.
7 THE COURT: Thank you.
8 Ms. Kleinfelter.
9 MS. KLEINFELTER: Your Honor, if
10 Universal Care, Inc. and Universal Care Health
11 Systems is standing before this Court and
12 acknowledging that they are subject to and
13 mandated and required by 569-106 to cooperate with
14 the commissioner as it is set out in that statute
15 and they acknowledge that they are entirely aware
16 of their obligations under that statute and will
17 fully comply with it, then we have no problem with
18 nonsuiting them from this action.
19 Our problem -- our experience has
20 been in the past -- has been with -- quite frankly
21 with the TennCare HMOs is that we've not received
22 that level of cooperation from the management
23 companies, and that's why the management companies
24 have been named.

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1 Because in the past -- and I think
2 it's also in existence here. Universal Care of
3 Tennessee has no office, has no employees anymore
4 here in Tennessee. Everything is located in
5 California. And the reason why they were named as
6 a respondent was to ensure that we did have access
7 to the records and information and data that
8 currently resides in California as well as the
9 cooperation of the employees that are still in
10 California.
11 But if Universal Care, Inc. and
12 Universal Care Health Systems are standing before
13 this Court and acknowledging that they are aware
14 of this, that they are bound by it and they're
15 going to follow it to the fullest extent, then we
16 are willing, of course, to nonsuit it, recognizing
17 that the statute authorizes us to come back before
18 this Court and seek an order assessing a civil
19 penalty against them and that also allows the
20 commissioner to --
21 I mean, assessing a fine against
22 them and allowing the commissioner to assess a
23 civil penalty against them in the event that they
24 fail to cooperate.

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1 MR. FARDON: If the question is
2 are they going to comply with the law, the answer
3 certainly is yes. I think that is an appropriate
4 position for the State to take. They should
5 nonsuit these two entities. If they later have
6 some kind of issue and they're not getting the
7 cooperation that they believe they're entitled to
8 under the statute, they can always come back to
9 the Court and seek some relief at that point.

10 THE COURT: Ms. Kleinfelter, it
11 sounds to me as though counsel for these two
12 parties has made the representation in open court
13 that they intend to comply with TCA 56-9-106. And
14 it sounds to me as though in light of that that
15 you were inclined to take a nonsuit as to those
16 two parties; is that correct?

17 MS. KLEINFELTER: Yes, Your
18 Honor.

19 THE COURT: It's the State's
20 position then that you will nonsuit those two?

21 MS. KLEINFELTER: Yes, Your
22 Honor.

23 THE COURT: Another
24 observation -- and this is not an order -- is that

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1 I do expect the two parties that have been
2 nonsuited to cooperate with the commissioner in
3 any proceeding or investigation, and it is the
4 representation that there are records, information
5 and data within the control of those two companies
6 that the commissioner would be interested in.

7 I also understand that there is an
8 ongoing business that has 13,000 employees. No?

9 MR. FARDON: Yes.

10 THE COURT: Somebody is saying no
11 back there.

12 THE SPECTATOR: 1,300.

13 MR. FARDON: I'm sorry. I wrote
14 it down wrong. I'm glad you asked again. It's
15 1,300, Your Honor, 1,300 employees.

16 THE COURT: And I was thinking
17 Vanderbilt was big. Thirteen hundred employees
18 sounds more like a very viable company. The other
19 sounded like a mini government. Thirteen hundred
20 employees.

21 The reason that I mention this is
22 that the cooperation that is sought should not
23 interrupt the ongoing business of the company, and
24 you can't demand that employees who are working to

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1 State of Tennessee. One is Universal Care of
2 Tennessee versus M.D. Goetz, Jr., et al. And that
3 is in U.S. District Court.

4 The other is Universal Care of
5 Tennessee versus M.D. Goetz, Jr., et al. That is
6 in the Tennessee Claims Commission. There is also
7 a filing on behalf of Universal Care through its
8 counsel that the Court appoint a disinterested
9 person to serve as special master or deputy
10 liquidator.

11 There is no authority by which the
12 Court can appoint a deputy liquidator or a special
13 deputy liquidator, and it is not in keeping with
14 the intent of the statute that that be done. I
15 have in the past appointed a special master, and
16 that was for my own edification. At this point I
17 don't feel that I need any edification, and the
18 appointment of a special master is not appropriate
19 at this time.

20 If this gets too complicated or
21 confusing for me, I might do it of my own accord.
22 However, to ensure that Universal Care is aware of
23 the actions that are taken in evaluating a claim,
24 I am instructing Mr. Hubbard in his capacity to

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1 fulfill the corporate ongoing business functions
2 sacrifice their time. There needs to be
3 reasonable deadlines, and that's my observation.

4 Now, with regards to the verified
5 petition for employment of a receiver for purposes
6 of liquidation and injunction, the application --
7 or rather the petition that was filed had a
8 proposed structure for an order requesting that
9 the following terms be followed.

10 Those terms give the commissioner
11 specific authority to act in accordance with the
12 statute based on all of the filings. The Court
13 finds that it is appropriate to order the
14 liquidation and to appoint the commissioner to
15 oversee this. In this proceeding, it's also been
16 asked that Mr. Hubbard -- I'm trying to find that
17 spot.

18 MS. KLEINFELTER: Your Honor, I
19 think it's Paragraph 17 of the proposed --

20 THE COURT: Thank you. It is
21 proposed that the commissioner retain services of
22 Mr. William Hubbard as special counsel to advise
23 and assist her as the liquidator in evaluating the
24 lawsuits that Universal has pending against the

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1 include a carbon copy of all correspondence that
2 he sends or any matters that he generates reports
3 to send a copy to counsel for Universal.
4 Mr. Hicks.

5 Mr. Hicks, you are entitled to ask
6 questions of Mr. Hubbard but not to the extent
7 that you interfere with his performance of his
8 duty as special counsel. Mr. Hubbard --

9 MR. HUBBARD: Your Honor, if I
10 may briefly. I think I'm not only -- it's not
11 only anticipated that I would do the evaluation of
12 the litigation but that I would also advise the
13 liquidator with the estate generally, and there
14 may be claims outside.

15 All potential claims of the estate
16 will be looked at in addition to the ones that are
17 pending. The only -- I'm not sure what the
18 petition says, quite frankly. But I'm concerned
19 that --

20 THE COURT: What I'm saying only
21 applies to the two cases that I've mentioned.

22 MR. HUBBARD: Okay.

23 THE COURT: And at some point you
24 may have to return to the Court, Mr. Hubbard.

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<p>1 Right now I see your position only as evaluating 2 the validity of the claim. You're going to make a 3 recommendation. However, if you continue on, at 4 some point you actually have an adversary in the 5 Claims Commission. That may be Mr. Hicks. 6 And it's not my intention for you to 7 be required at the point that you make a 8 determination to share what would be -- you're 9 counsel as her advisor. Right now you are to keep 10 him briefed on the steps that you're taking to 11 discover information. 12 MR. HUBBARD: Okay. 13 THE COURT: It's not your advice 14 that you are required to disclose. 15 MR. HUBBARD: Thank you, Your 16 Honor. 17 THE COURT: But what has happened 18 in the past is that when an attorney has called up 19 and made an inquiry, they've been told, I don't 20 have to tell you anything. That's not true. And 21 I know that you wouldn't do that, Mr. Hubbard. 22 But I'm nipping it in the butt so that 23 procedurally you're sharing and keeping them 24 abreast of what you're doing and where you are.</p> <p style="text-align: center;">61</p>	<p>1 THE COURT: Is that in the 2 suggested wording? 3 MS. KLEINFELTER: Yes, Your 4 Honor. It's on Paragraph 23, the proposed -- 5 THE COURT: Claims deadline? 6 MS. KLEINFELTER: Right. 7 THE COURT: It was my intention 8 that the wording as submitted is going to be in 9 the order just as it's set up. When I read 10 through this, I went quickly and didn't stick on 11 the deadlines. But it has to have a structure, 12 and that was the structure that I've approved. 13 MS. KLEINFELTER: Cutting and 14 pasting is great. 15 THE COURT: I think you'll be 16 able to submit an order in that regard, and I will 17 wait until I see the next filing. 18 MS. KLEINFELTER: If it's okay. 19 Your Honor, I would like to submit two separate 20 orders, one, the order appointing the receiver, 21 and then we'll submit a second order nonsuiting or 22 just a notice of nonsuit against -- 23 THE COURT: That will be fine. 24 (Proceedings concluded.)</p> <p style="text-align: center;">63</p>
<p>1 And as you discover facts, you can 2 share the facts because that should be open. Once 3 you get to the point of discussing with your 4 client, that's not to be shared. 5 MR. HUBBARD: Thank you. 6 THE COURT: Now, have I addressed 7 all the issues that are before me right now? 8 MR. HICKS: I believe so, Your 9 Honor. I'm not aware of anything else. 10 THE COURT: Then I would need an 11 order, and, Mr. Hicks, you'll be receiving copies. 12 I will tell you -- 13 MR. HUBBARD: Your Honor, there 14 is -- I'm sorry to interrupt you, but -- 15 THE COURT: Another no no here in 16 my court. All right. 17 MR. HUBBARD: My client pointed 18 out to me that the order does have a suggested 19 date for claims in it that -- 20 MS. KLEINFELTER: January 15, 21 2004. 22 MR. HUBBARD: If Your Honor could 23 approve that claim date, that would be helpful to 24 us.</p> <p style="text-align: center;">62</p>	<p>1 COURT REPORTER'S CERTIFICATE 2 STATE OF TENNESSEE: 3 COUNTY OF DAVIDSON: 4 5 I, RHONDA S. HORNUNG, Registered Professional 6 Reporter and Notary Public, Davidson County, 7 Tennessee, CERTIFY: 8 9 1. The foregoing proceedings were taken 10 before me at the time and place stated in the 11 foregoing styled cause with the appearances as 12 noted; 13 14 2. Being a Court Reporter, I then reported 15 the proceedings were in Stenotype to the best of 16 my skill and ability, and the foregoing pages 17 contain a full, true and correct transcript of my 18 said Stenotype notes then and there taken; 19 20 3. I am not in the employ of and am not 21 related to any of the parties or their counsel, 22 and I have no interest in the matter involved. 23 24 WITNESS MY SIGNATURE, this, the ____ day of _____, 2003. RHONDA S. HORNUNG Registered Professional Reporter Notary Public for the State of Tennessee at Large *** My commission expires: March 31, 2007</p> <p style="text-align: center;">64</p>